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Supreme Court, U.S.
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NO. 91-1991

In the Supreme Court of the United States

OCTOBER TERM, 1991

ANTHONY C. PRUDHOMME, et. al.,

Petitioners,

vs.

TENNECO OIL COMPANY, et. al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI BY RESPONDENT BOOKER DRILLING COMPANY D/B/A GRACE OFFSHORE COMPANY

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QUESTION PRESENTED

Whether the Court of Appeals for the Fifth Circuit was within its authority under 28 U.S.C. §2106, to vacate a portion of the judgment of the United States District Court, and render a decision without remand.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit (petitioners' Appendix, page xxix), is reported at 955 F.2d 390. Findings of Fact and Conclusions of Law, and the Judgment of the district court are printed in petitioners' Appendix, at pages xiv and xxv.

SUPPLEMENTATION OF THE BASIS FOR JURISDICTION

The judgment of the court of appeals was entered on March 13, 1992. Rehearing was denied on April 13, 1992 (955 F.2d 390 (5th Cir. 1992), petitioners' Appendix, pages xxix and 1xvii). This Court has jurisdiction under 28 U.S.C. §1254 (1).

SUPPLEMENTATION OF STATEMENT OF THE CASE

The pertinent facts and procedural history of this case are fully reported in the decision of the court of appeals at 955 F.2d 390 (5th Cir. 1992) (also, petitioners' Appendix, at page xxix). It should be clearly apparent from the appellate court's decision and from petitioners' Statement of the Case, that there are no issues of conflict between courts of appeal, decisions of this Court, nor are there any constitutional, or other compelling reasons for granting of a Writ of Certiorari.

This action is one which involves an abuse of discretion by a district court judge, which resulted in an unfavorable decision against defendant, Booker Drilling Company, (Booker). The court of appeals was able to review the entire record, procedural history, and objections preserved by the defendant, and render judgment without remand for the development of additional facts.

Petitioners' Statement of the Case does not begin to explain that the subject of the appeal before the Fifth Circuit was the district court's abuse of discretion in permitting plaintiffs to present evidence of strict liability under Louisiana Civil Code Article 2317. The court of appeal correctly determined from the record, that months before trial and upon formal motion by the Prudhommes, the district court signed and filed an order dismissing the Prudhommes' cause of action in strict liability. The court's order of dismissal mislead Booker into believing that plaintiffs intended to pursue Booker in negligence only, and induced prejudicial inaction on its part with regard to the former strict liability claim. On the morning of trial and despite its recent order, the district court, sua sponte, sprung strict liability on Booker. The district court then

overruled all objections by counsel for Booker and directed the trial to proceed. At the conclusion of the trial, the only basis for liability against Booker was strict liability. Booker was found not to be negligent in any manner.

In vacating the judgment of the district court, the court of appeal commented:

> Not even the most cautious of defense counsel could reasonably have expected to prepare to defend against strict liability when the case went to trial. Requiring counsel to do so under the instant circumstances was fundamentally unfair and unreasonable, the very stuff of which abuse of discretion is made.
>
> That the manner in which Booker was mislead rose to the level of prejudice is clear beyond peradventure.

REASONS FOR DENYING WRIT OF CERTIORARI

1. PETITIONERS' WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE THERE ARE NO COMPELLING REASONS OR MATTERS OF SPECIAL INTEREST WHICH WARRANT THIS COURT'S REVIEW.

Petitioners do not assert that the decision of the court of appeals is in conflict with decisions of other circuit courts, that it is contrary to decisions of this Court, or that there is an important issue of constitutional law. The Petition for Writ of Certiorari is based solely on the premise that the appellate court acted improperly in vacating the lower court's judgment, and in rendering a decision without remand of the case to the district court for further proceedings. Their position, which is clearly contrary to the

statutory authority of the court of appeals under 28 U.S.C. §2106, warrants no further review.

II. THE FIFTH CIRCUIT COURT OF APPEAL ACTED WITHIN ITS AUTHORITY IN VACATING A PORTION OF THE JUDGMENT OF THE DISTRICT COURT, AND IN RENDERING JUDGMENT WITHOUT REMAND.

Federal courts of appeal have the statutory authority to decide matters brought on for review. 28 U.S.C. §2106 provides:

> The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

The court of appeals is by no means required to remand a case where the record before it is complete and no further findings of fact are necessary. *Richmond Leasing Co. v. Capital Bank, N.A.*, 762 F.2d 1303 (5th Cir. 1985); *Hellenic Lines, Ltd. v. Prudential Lines, Inc.*, 813 F.2d 634 (4th Cir. 1987); *Hutchinson Telephone Co. v. Fronteer Directory Co.*, 770 F.2d 128 (8th Cir. 1985).

As the Federal Circuit Court of Appeals stated in *Consolidated Aluminum Corp. v. Foseco Intern., Ltd.*, 910 F.2d 804 (Fed. Cir. 1990), at p. 814:

> A remand, with its accompanying expenditure of additional judicial resources in a case thought to be completed, is a step not lightly taken and one

> that should be limited to cases in which further action must be taken by the district court or in which the appellate court has no way open to it to affirm or reverse the district court's action under review. See 9C. Wright, A. Miller and F. Elliot, *Federal Practice and Procedure*, §2577 (1971) and Supp. (1990).

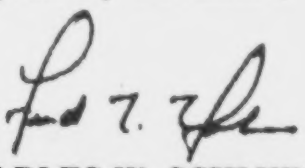
As the court of appeal's decision clearly illustrates, the record is replete with facts and a procedural history which unequivocally support the action taken in view of the district court's abuse of discretion. Petitioners fail to point out a single reason why remand to the district court is an appropriate remedy.

In this particular instance, the district court's abuse of discretion inured to the benefit of petitioners. The Prudhommes were permitted to present all of their evidence in support of their claim of strict liability against Booker. A remand would only serve to allow petitioners "two bites of the apple" or a windfall opportunity to cure the deficiencies of their case which has already been presented to the district court. Since the Prudhommes have already had a full opportunity to present their evidence, the court of appeals has deemed a remand to be totally unnecessary in this case. See *Burriss v. Texaco, Inc.*, 361 F.2d 169 (4th Cir. 1966); *E.E.O.C. v. Westinghouse Elec. Corp.*, 925 F.2d 619, (3d Cir. 1991).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned counsel hereby certifies that the Petition of Writ of Certiorari filed on behalf of Petitioners, Anthony C. Prudhomme, et al, was received on June 12, 1992, and that the Opposition to Petition for Writ of Certiorari by respondent Booker Drilling Company, d/b/a Grace Offshore Company, is being filed and served by U.S. mail, first class postage prepaid and upon counsel of record for Petitioners through their attorney of record, Homer Ed Barousse, 129 East Hutchinson Ave., Crowley, Louisiana 70527-0730, this 8th day of July, 1992.